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In The Supreme Court of the United States

ARTHUR P. CHRISTIE, ANTHONY L. ALFORD, DANIEL A. DEIGHTON, FREDERICK W. JENNART, DAVID N. HARVEY, M.D., MICHAEL A. HELLWEGE, M.D., F. HUNT SANDERS, M.D., RICHARD J. SULLIVAN, M.D., TITUS A. TAUBE, M.D., C. SCOTT EDENFIELD, M.D., RAHIL KAZI, M.D., RICHARD L. HEATON, M.D., BRITTON L. PILCHER, M.D., SANTANU DAS, M.D., THOMAS C. JOHNSON, M.D., RICHARD B. ELLIS, M.D., AND HOSPITAL AUTHORITY OF HOUSTON COUNTY d/b/a HOUSTON MEDICAL CENTER,

Petitioners,

v.

RUSSELL E. ADKINS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; AND BRIEF *AMICUS CURIAE* OF THE JOINT COMMISSION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Petitioners Arthur P. Christie, et al. ("Petitioners") have consented to the filing of this brief by *amicus curiae* The Joint Commission. Because the Respondent, Russell E. Adkins, M.D. ("Respondent"), has withheld consent, The Joint Commission hereby moves, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amicus curiae* brief in support of Petitioners.

The Joint Commission is a private not-for-profit tax exempt 501(c)(3) corporation. It is governed by a 29-member Board of Commissioners that currently includes physicians, administrators, nurses, a labor leader, quality experts, an ethicist, a consumer patient safety advocate, and educators. The Board of Commissioners brings to The Joint Commission diverse experience in health care, business and public policy. The Joint Commission's corporate members are the American College of Physicians, the American College of Surgeons, the American Dental Association, the American Hospital Association, and the American Medical Association. The Joint Commission is the nation's oldest and largest health care standards setting and accrediting body for health care organizations in this country.

The sole mission of The Joint Commission is to help enhance the quality and safety of health care through the provision of health care accreditation and

related services. In pursuit of this mission, The Joint Commission promulgates standards it believes health care organizations should meet to facilitate the provision of safe, high quality care, and surveys health care organizations for compliance with those standards. The Joint Commission accredits more than 14,000 health care organizations and programs in the United States, including hospitals and other health care organizations that provide home care, long term care, behavior health care, laboratory, and ambulatory care services.

Amicus participation is governed by Rule 37. Rule 37(1) states that "relevant matter not already brought to its attention by the parties may be of considerable help to the [Supreme] Court." As the nation's premier health care accrediting body, The Joint Commission is in a unique position to lend insight into the importance of the peer review process and the application of a privilege to that process in the health care setting. Because of its mission and the nature of its nationwide work, The Joint Commission has an interest in the application of the medical peer review privilege at the federal level and is directly affected by the Eleventh Circuit Court's decision.

The Joint Commission has repeatedly expressed its view that the confidentiality of peer review activity is critical if the safety of patient care is to be best protected and the quality of care is to be best enhanced. In this regard, any threat to consistency in the application of peer review statutes is of great

concern. The Joint Commission thus wishes to submit this brief to illustrate the impact of the Eleventh Circuit Court's decision on the health care industry. Given the ramifications of this case on The Joint Commission's work, it respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioners' request that this Court hear this case.

Respectfully submitted,

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BRIEF OF THE JOINT COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This *amicus curiae* brief is submitted on behalf of The Joint Commission.[1] Petitioners have consented to The Joint Commission's filing of this brief. The Respondent has withheld consent. A motion for leave to file an *amicus curiae* brief under Supreme Court Rule 37(2)(b) is included with this brief. The correspondence regarding The Joint Commission's requests for consent have been filed in the Office of the Clerk.

I. INTEREST OF *AMICUS CURIAE*

The Joint Commission evaluates and accredits more than 14,000 health care organizations and programs in the United States. An independent, not-for-profit organization, The Joint Commission is the nation's predominant standards-setting and accrediting body in health care. Since its inception in 1951, The Joint Commission has maintained state-of-the-art standards that focus on improving the quality and safety of care provided by health care organizations. The Joint Commission's comprehensive accreditation process evaluates an organization's compliance with these standards and other accreditation requirements. Joint Commission accreditation is recognized

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[1] This brief was authored in whole by counsel for The Joint Commission. No person or entity made a monetary contribution to this brief's preparation or submission. *See,* Sup. Ct. R. 37.6.

nationwide as a symbol of quality that reflects an organization's commitment to meeting certain performance standards.

Accreditation by The Joint Commission is of great importance to health care organizations. Among other reasons, the Medicare Act of 1965, 42 U.S.C. § 1395bb specifically provides that hospitals accredited by The Joint Commission, subject to certain limited exceptions, are deemed to be eligible to participate in the Medicare program. Thus, The Joint Commission plays a key role in the federal government's oversight of reimbursement for health care services. For one governmental purpose or another, the vast majority of states recognize Joint Commission accreditation.

Hospital medical staffs, pursuant to Joint Commission standards, participate in a "series of activities designed to collect, verify, and evaluate data relevant to a practitioner's professional performance." Hospital Accreditation Standards at 371, The Joint Commission on Accreditation of Healthcare Organizations (2007). The Joint Commission relies on these very peer review activities as the basis for accredited hospitals meeting appropriate medical staff standards.

II. SUMMARY OF ARGUMENT

The states have the responsibility to regulate health care with the purpose of protecting the quality and safety of care for patients in our nation's hospitals and health care organizations. One important method of accomplishing this is for states to enable physicians to be able to speak openly and candidly about health care rendered to patients, i.e., to be able to work together and, pursuant to medical staff bylaws, provide oversight for the quality of care, treatment, and services provided by health care practitioners. Hospital Accreditation Standards at 360, Joint Commission on Accreditation of Healthcare Organizations (2007). The peer review process and state laws that encourage peer review are intended to further this goal. The parties have addressed the peer review process, and certainly the federal courts have recognized the importance of peer review. It is the treatment of this process among state and federal courts, however, that causes The Joint Commission considerable concern, because there is a lack of consistency in how state and federal courts view the peer review privilege. The federal court interpretations can have the effect of thoroughly undermining a state's determinations about the peer review process intended to further the quality and safety of patient care in that state. In order to preserve the integrity of the peer review process, the impact of federal decisions cannot be isolated from the overall impact in that state.

Due to the unique position of The Joint Commission and its insistence in the pursuit of its mission that accredited organizations should engage in an effective peer review process, The Joint Commission respectfully requests this Court to accept *certiorari* in order to make clear to its lower federal courts the importance of this issue. Most notably, there presently exists a federal public policy against privileges that is based upon the underlying " . . . maxim that the public . . . has a right to every man's evidence." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (citations omitted). This policy is inconsistent with the purpose of peer review privileges established by state laws.

III. ARGUMENT

A. HEALTH CARE REGULATION, INCLUDING DETERMINING THE VALUE OF PEER REVIEW, IS LEFT TO THE STATES AS PART OF THEIR POLICE POWERS

Notwithstanding its position as a national organization that accredits health care institutions nationwide and its relationship with the federal government, The Joint Commission is fully aware that the actual regulation of health care is essentially left to the states. The Joint Commission understands that this role is generally considered to be a part of a state's police power to protect the health and welfare of citizens within each state. This Court, in fact, has recognized that states have " . . . great latitude under their police powers to legislate as to the protection of

the lives, limbs, health, comfort, and quiet of all persons." *Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006) citing *Medronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). What exists in federal jurisprudence has been a bedrock of state law. For example, in discussing Illinois' licensure act for physicians as prohibiting the practice of medicine without a license, that state's appellate court held such prohibition to be within "[t]he state's inherent police power . . . to enact reasonable legislation to secure the public's health and safety by licensing physicians." *People v. Ray*, 119 Ill.App.3d 180, 183, 456 N.E.2d 179, 182 (1983) citing *Rios v. Jones*, 63 Ill.2d 488, 348 N.E.2d 825 (1976). Further, Georgia's Supreme Court recognized that "[t]he preservation of public health is one of the duties devolving on the State as the sovereign power, and the discharge of this duty is accomplished by means of the exercise of the inherent police power of the sovereign." *Cobb County Kennestone Hosp. Authority v. Prince, et al.*, 242 Ga. 139, 143, 249 S.E.2d 584 (1978), citing *Hughes v. State Bd. of Med. Examiners*, 162 Ga. 246, 256, 134 S.E. 42, 46 (1926); *Yeargin v. Hamilton Mem'l Hosp.*, 225 Ga. 661, 171 S.E.2d 136 (1969). In furtherance of this police power, Georgia's state legislature promulgated the Hospital Authorities Law to provide for the "health and welfare of the community . . . [by] creat[ing] hospital authorities in order to promulgate rules and regulations 'necessary and convenient to carry out and effectuate' their purposes." *Id.*

at 144, 249 S.E.2d 584, 585, citing Ga. Code Ann. §§ 88-1801 et seq.

The states, of course, cannot effectively regulate health care without a system that incorporates professional expertise. Thus, peer review committees are formed "to evaluate the competence and quality of care rendered at medical institutions." Dorothy Duffy and Martha C. Romney, *Medicine and Law: Recent Developments in Peer Review and Informed Consent*, 26 Tort & Ins. L.J. 331 (1991). Medical peer review committees are essential to assess the competence of a medical staff and monitor a physician's performance. *Id.* To encourage participation and candor in that evaluation process, statutory privileges have been enacted to protect the work of all such committees. *Id.*

The peer review process as contained within state peer review statutes is a critical element of a state's regulation of health care. Numerous state courts have affirmed the importance of peer review, and have also affirmed that it remains within the ambit of state peer review protective statutes. In *Young v. Saldanha*, 189 W.Va. 330, 334 (1993), the West Virginia Supreme Court of Appeals recognized that "West Virginia's peer review statutes, like those enacted throughout the country [citing to, 3 Miles J. Zaremski & Louis S. Goldstein, Medical and Hospital Negligence, sec. 44A:07 n.1 (Callaghan 1991)] were put in force 'with the ultimate purpose of improving the quality of medical care in . . . this state.' *Daily Gazette Co. v. West Va. Bd. of Med.*, 177 W.Va. 316,

333, 352 S.E.2d 66, 71 (1986)." As examples of all states that have peer review statutes, the supreme courts of Illinois, Rhode Island, and Mississippi similarly recognize that the peer review process is to ensure and maintain quality of care. *Jenkins v. Wu*, 102 Ill.2d 468, 482 (1984) (confidentiality of peer review information " ... improve[s] health care within the State); *Moretti v. Lowe*, 592 A.2d 855, 857 (R.I. 1991) (discovery immunity is to be strictly construed and limited to its intended purposes; peer review is to ensure that medical care of high quality will be available to the public); and *Claypool v. Mladineo*, 724 So.2d 373, 385-386 (Miss. 1998) (agrees with *Moretti*, and finds peer review is to ensure that medical care of high quality will be available to the public, and the public purpose is not served if the privilege is applied beyond what was intended and necessary to accomplish the public purpose, and the purpose the language of the statute was intended to achieve).

The point The Joint Commission is respectfully making here is that peer review privileges cannot be viewed in isolation, but should be viewed as one critical piece in state regulation of health care.

B. CONFUSION REMAINS IN PEER REVIEW ANALYSES BY FEDERAL COURTS

Hospital engagement in peer review is one of the foundations of The Joint Commission's hospital

accreditation process. Uncertainty at the federal level in the application of peer review privilege protection will compromise the ability of peer review committees to adequately carry out their work. The Joint Commission's reliance upon peer review committees will be undermined, and the quality of care and patient safety will be adversely affected.

The appellate court in *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007) discussed the factors to consider in deciding whether or not a federal evidentiary privilege should be created. *Jaffee v. Redmond*, 518 U.S. 1, 10-16 (1996). The Joint Commission believes there is no question that what the states have done in enacting peer review privilege statutes serves the public good and fosters the imperative need for confidence and trust. By accepting *certiorari*, the Court would have the opportunity to make certain that quality of care and patient safety are not subservient to federal decisions discouraging privileges. In so doing, this Court also will have the opportunity to recognize that state law governing peer review as part of a state's responsibility to regulate health care should not be undermined at the federal level.

IV. CONCLUSION

The federal courts should not ignore the problem caused by a lack of consistency in the application of the peer review privilege. Accepting *certiorari* will allow this Court to set forth a solution to a problem in

an area that is vital to the quality of care and patient safety.

Respectfully submitted,

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